AMBIGA SREENEVASAN

v.

KETUA PENGARAH IMIGRESEN, MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J
[JUDICIAL REVIEW NO: R2-25-117-2011]
4 AUGUST 2011

IMMIGRATION: *Denial of entry - Issuance of notice of refusal - Judicial review - Certiorari - Mandamus order for permission to enter - Whether Senior Federal Counsel and State Counsel entitled to be present during court proceedings - Whether parties proper and relevant - Jurisdiction of court - Whether applicant's case arguable*

Upon her arrival at the Kuching Airport, the applicant was denied entry into the state of Sarawak at the Immigration Department Counter. She was issued a notice of refusal of entry by the second respondent and subsequently left Sarawak on the next flight for Kuala Lumpur. In the present application for leave for judicial review, the applicant sought a *certiorari* order to quash the notice of refusal of entry and a *mandamus* order to compel the first, second and third respondents to permit the applicant entry to the State of Sarawak. The preliminary issue raised was whether the Senior Federal Counsel and the State Counsel of Sarawak were entitled to be present in the court during proceedings stage since an application for leave was to be heard *ex parte* and no affidavit was filed by the respondents. The court then proceeded to deliberate on the issues of: (i) whether the first and third respondents were the relevant or proper parties in the application; (ii) whether the court had the jurisdiction to hear the application; and (iii) whether the applicant had an arguable case.

Held (dismissing application with no order as to costs):

(1) Although an application for leave is by way of an *ex parte* application, it does not preclude any person who has interest or is adversely affected by the court's decision, from appearing. Under O. 53 r. 8 of the Rules of the High Court 1980 ('RHC'), any person who desires to be heard or who appears to the judge, to be a proper person, may be heard even though he has not been served with the application. The

present application was served on the Attorney General's Chambers under O. 53 r. 3(3) of the RHC, which is a mandatory requirement. If O. 53 allows the attendance of a person who has an interest to appear even if he was not served with the application, it would be more so the case for representative of the Attorney General considering service on his chambers is mandatory. The reliefs sought in the application would invariably affect the public officer or authority that made the impugned decision and this in itself, was sufficient to justify the presence of the Senior Federal Counsel and State Counsel of Sarawak. (para 4)

(2) The submission of the applicant's counsel that the first respondent had a general supervision relating immigration matter throughout Malaysia under s. 3(2) of the Immigration Act ('Act') was misconceived. By virtue of s. 64, the decision to deny entry to the applicant to the State of Sarawak undoubtedly vested upon the State Authority of Sarawak. The impugned decision could have only been made under the direction of the State Authority and not the first respondent. Since it was not the first defendant's direction, it had no relevance and consequences to the second respondent. In a judicial review proceeding, the court undertakes the review of the decision by a decision-maker and not by any other person. The Chief Minister was not a proper party as he was not involved in the decision-making process. (paras 8-10)

(3) The High Court of Sarawak was the proper forum as the cause of action arose in Sarawak, the proper respondents were in Sarawak and the facts on which the proceedings were based, occurred in Sarawak. Therefore, the court did not have the necessary jurisdiction to hear the present matter. (para 14)

(4) There was nothing in the deponent's statement which supported the contention that the applicant was entering Sarawak under s. 67 of the Act. Section 67 of the Act prescribed that the burden of proof that a person is entitled to enter the East Malaysia State shall lie on that person. However, no sufficient material was shown to support her case. Her contention of entry based on s. 67 was only made after the event. (para 19)

Cases(s) referred to:

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 HC ***(refd)***

Gobalakrishnan Nagapan v. Director of Immigration, Sarawak & Ors [2009] 2 CLJ 703 HC ***(refd)***

George John v. Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors [1987] 1 LNS 111 HC ***(refd)***

Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 FC ***(refd)***

John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 ***(refd)***

Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Berhad [1995] 3 CLJ 627 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)
Federal Constitution, art. 121
Immigration Act 1959/63, ss. 3(2), 59A, 62, 64, 65(1)(a), 67
Rules of the High Court 1980, O. 15 r. 6, O. 15 r. 6(2), O. 15 rr. 6(2)(b), O. 53 rr. 3(3), 8

For the applicant - Tommy Thomas (James Khoong with him); M/s James Khong
For the Attorney General's Chambers - Azizah Hj Nawawi SFC
For the 3rd respondent - Fong Joo Chung SC

Reported by Najib Tamby

JUDGMENT

Rohana Yusuf J:

[1] This is an application for leave for judicial review seeking the following reliefs:

(i) An order of *certiorari* to quash the notice of refusal of entry dated 15 April 2011 issued by the second respondent, who had refused the applicant entry into the State of Sarawak; and

(ii) An order of *mandamus* to compel the first, second and third respondents to permit the applicant to enter the State of Sarawak.

Facts

[2] The facts leading to this application are these. On 15 April 2011, the applicant arrived at Kuching Airport from Kuala Lumpur. At the Immigration Department Counter, the applicant was denied entry into the State of Sarawak. No pass was issued to her to enter the state. The applicant was given a notice of refusal of entry dated 15 April 2011 as per exh. A3 (the impugned decision). The applicant left Sarawak on the next available flight for Kuala Lumpur

Preliminary Issue

[3] Learned counsel for the applicant Tommy Thomas, raised an issue on whether learned Senior Federal Counsel Azizah Nawawi and learned State Counsel of Sarawak JC Fong could be present at the stage where leave was to be obtained. He contended that since an application for leave is to be heard by way of *ex parte* and that there was no affidavit filed by the respondents, they were not entitled to be present in court at this stage of the proceedings. Hence, the court should just accept the statements of the applicant in the application as the truth on face value as there were no affidavits in rebuttal.

[4] Dato' JC Fong countered the argument citing the decision of the late Lim Beng Choon J in *George John v. Goh Eng Wah Bros. Filem Sdn Bhd & 2 Ors* [1987] 1 LNS 111. In that case, the presence of Senior Federal Counsel at leave stage, opposing leave on ground of locus was objected to by the applicant. The learned judge observed that though leave is an *ex parte* application, it does not preclude any person who has interest or who is adversely affected by a decision of the court from appearing. In fact under O. 53 r. 8 of the RHC, any person who desires to be heard or who appears to the judge, to be a proper person, may be heard notwithstanding he is not been served with the application. The present application was served on the Attorney General's Chambers under O. 53 r. 3(3) of the RHC. It is a mandatory requirement to serve the Attorney General's Chambers. Following such a requirement, it makes little or no sense to deny

the appearance of the learned Senior Federal Counsel. It also follows that if O. 53 allows the attendance of a person who has an interest to appear even if that person was not served with the application; it would accordingly be more so the case for the representative of the Attorney General considering that service on his chambers is mandatory. The reason for the presence of the representative of the Attorney General and the State Legal Counsel here is well understood. The reliefs sought in this application would invariably affect the public officer or authority that made the impugned decision in the State of Sarawak and the respondent cited. In my view, this in itself is sufficient to justify their presence in court. Their presence to address the issue on whether or not, there is proper application before the court may prevent waste of judicial time on vexatious and or frivolous application. That is also good enough reason bearing in mind that the courts are often burdened with cases resulting in backlog of cases in the legal system. Furthermore, no objection was raised when both learned Senior Federal Counsel and learned State Legal Counsel were present at the last hearing date. They both filed their written submissions then and adjournment was sought by learned counsel for the applicant to be heard today on the basis that time is required to reply to the objections raised in their written submissions in opposing this application.

[5] For all these reasons, I am inclined to hold that there are good reasons for their presence in this court today. I will now proceed to deal the objections raised by them.

Grounds Of Challenge

[6] Both Datin Azizah and Dato' JC Fong raised the following objections on the application for leave by the applicant:

(i) That the first respondent and the third respondent are not the relevant or proper parties in this application;

(ii) That this court has no jurisdiction to hear this application; and

(iii) That the applicant has no arguable case.

[7] The first ground of challenge is on the issue of proper party. The applicant in her application is challenging the decision in A-3 issued by Timbalan Pengarah Imigresen Sarawak on behalf of Pengarah Imigresen Sarawak. Learned Senior Federal Counsel

contended that the second respondent, namely, the Pengarah Imigresen Sarawak, in issuing the impugned decision, was doing so under the direction of the State Authority under s. 65(1)(a) of the Immigration Act 1959/63. Section 65 provides that the director (the second respondent) must comply with any direction given by the State Authority.

[8] It is clear that, A-3 was issued by the Director of Immigration of Sarawak under the direction of the State Authority, and not under the direction of the first respondent, Ketua Pengarah Imigresen, Malaysia. Hence, the submission of learned counsel for the applicant Encik Tommy Thomas that the first respondent has a general supervision relating immigration matter throughout Malaysia under s. 3(2) is misconceived. It must be noted that s. 64 clearly provides for the application of Part I to VI of the act to be subjected to Part VII, which are special provisions relating to East Malaysia. The Federal Court had decided in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105, on the implication of Part I to Part VI to the states of Sabah and Sarawak as special law. In the words of Mohd Dzaidin FCJ:

> Thus it seems clear to us that the legislature in passing Part VII was undoubtedly giving effect to the above mentioned terms and Art. V of the Malaysia Agreement agreed upon between the Federation of Malaya and Sabah. Indeed s. 64(1) referred to by the learned State Attorney-General employs clear language by the words "subject to and in accordance with this chapter" meaning that the application of Part I and VI is dependent and conditional upon Part VII. Since Part Vii has been provided as a special law, the general provisions of Parts I to VI must give way to the special provisions of Part VII in accordance with the principle of *generalibus specialia derogant.*

[9] From these provisions it is clear that the decision to deny entry to the applicant to the State of Sarawak is undoubtedly within the powers of the State Authority of Sarawak pursuant to the arrangement between the Federation and the State of Sabah and Sarawak in participating in the new Federation of Malaysia. Thus the impugned decision could have only been made under the direction of the State Authority and not the first respondent. Not being a direction of the first respondent, it has no relevance and accordingly, no consequences to the second respondent in this case.

[10] The applicant also cites Ketua Menteri Sarawak in the capacity of a State Authority as the third respondent. Learned State Legal Counsel submitted that the third respondent is not a proper party to this application. He submitted that the State Authority in s. 62 is defined as 'the Chief Minister or such person holding office in the State as the Chief Minister may designate for the purpose.' He drew the court's attention to the gazette notification, which shows the Chief Minister had designated the State Secretary for purposes under s. 62. This was done *vide* gazette notification GNS 192/1963. Though Encik Tommy Thomas objected to the introduction of the gazette on the basis of introducing evidence without affidavit in support, it must be noted that gazette notification is public notice and requires no introduction by way of evidence. The court is not at liberty to ignore a government gazette and must take judicial notice thereof. The said gazette is a public notice, which shows that the State Secretary has been designated as the State Authority under s. 62. It is obvious that A-3 is made on the direction of the designated State Authority for that purpose. The Chief Minister is therefore not a proper party because he has no involvement in the decision making process. In a judicial review proceedings, the court undertakes the review of the decision by a decision maker, and not by any other person. Since the Chief Minister is not in any way involved in the impugned decision, he cannot be a party to the application.

[11] It was submitted by Encik Tommy Thomas that even if this application cited wrong parties it could be saved by virtue of O. 15 r. 6 of the RHC. Under O. 15 r. 6, no cause or matter shall be defeated because of misjoinder of parties and the court must still determine issue affecting the proper party. However, this contention cannot hold good because the Federal Court in *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 CLJ 405 has held that O. 15 r. 6(2) does not apply to application made under O. 53, basing on the maxim '*generalia specialibus no derogant*'. According to the Federal Court in that case O. 15 r. 6(2)(b) cannot be invoked to override specific provision in an O. 53 application.

[12] Thus, since the first respondent and the third respondent are not the decision makers of the impugned decision, judicial review cannot lie against them. To put it differently, there is no decision

by the first and second respondents that is before this court to review. On this ground alone, this application ought to be struck out.

Jurisdiction

[13] Be that as it may, I will nevertheless proceed to determine the next ground of objection raised by the respondent. The objection raised is that, this court is not possessed of jurisdiction under s. 23(1) of the Courts of Judicature Act 1964. Both Datin Azizah and Dato' JC Fong contended that this application should have been made before the High Court of Sarawak. This is in line with s. 23(1) of the Courts of Judicature Act 1964. The jurisdiction of the High Court to try civil proceedings is based on:

(a) Where cause of action arose; or

(b) Where the defendant or one of several defendants reside or his place of business;

(c) Where the facts on which the proceedings are based exist or alleged to have occurred.

[14] In the present case, the cause of action arose in Sarawak, the proper respondents (defendants) are in Sarawak and the facts on which the proceeding is based occurred in Sarawak. Clearly, the High Court of Sarawak would be the proper forum and this court does not have the necessary jurisdiction to hear this matter.

[15] The Court of Appeal in *Fung Beng Tiat v. Marid Construction Co* [1997] 2 CLJ 1 supports the decision of the High Court in *Dayasar Corp Sdn Bhd v. C.P Ng & Co Sdn Bhd* [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 on this issue of jurisdiction. In *Fung Beng Tiat*, it is stated that art. 121 of the Federal Constitution provides for two separate High Courts, High Court in Malaya and the High Court in Sabah and Sarawak. There is no provision in any law for this court to transfer the present proceedings to Sarawak and it cannot be done even by consent or waiver of a party. Being bound by the Court of Appeal decision, I am in no position to transfer this proceedings to the right forum in Kuching.

Threshold Issue

[16] It was also submitted by the applicant that the burden to be discharged at leave stage is only to establish an arguable case. This is the legal position as stated in the Supreme Court case of

John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC and also in *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 and more recently in *Gobalakrishnan Nagapan v. Director of Immigration, Sarawak & Ors* [2009] 2 CLJ 703. It is common ground that to succeed on leave application, the applicant needs only to show there is an arguable case, and that the case is not frivolous. The applicant contended that even though the decision of the second respondent is not subjected to a judicial review as provided under s. 59A of the Act, the applicant falls within the exception to the said section.

[17] The applicant says she came within the exception to s. 59A because the impugned decision does not comply with procedural requirement. Learned State Legal Counsel contended that there is nothing in the statements to this application that disclose what is the procedural non-compliance by the respondent under the Act or the Regulations governing this decision. The Federal Court in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 held that, if there is no procedural requirement provided in any law, it is not for the court to create the same. Furthermore, the application did not plead sufficient material to state the alleged procedural requirement or the breach thereof, under the act or the regulations.

[18] Learned counsel for the applicant also contended that the applicant should be allowed entry under s. 67 of the Act on the ground that the applicant can enter without a pass because she is entering Sarawak, for the sole purpose of engaging in legitimate political activity. It is provided that a person has right to enter East Malaysian State for exercise of political rights.

[19] Again, there is nothing in the deponent's statement that supports the contention that the applicant is entering Sarawak under s. 67. Under s. 67, the burden of proof that a person is entitled to enter the East Malaysian State shall lie on that person. As required in *Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627, no sufficient material was shown to support her case. In any event, her contention of entry based on s. 67 is only made after the event.

A **[20]** For all the above reasons I find merits in the objections raised by both learned Senior Federal Counsel and the learned State Legal Counsel in this leave application. I therefore dismiss the application for leave with no order as to costs.

B

C

D

E

F

G

H

I